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Authorities Cited.

SUPREME COURT OF THE UNITED STATES.

CANUTE STEAMSHIP COMPANY, LTD., and COMPANIA NAVIERA SOTA Y AZNAR, *Petitioners,* *against* PITTSBURGH & WEST VIRGINIA COAL COMPANY, *et al.*, *Respondents.*	October Term, 1923. No. 72.

BRIEF FOR PETITIONERS.

This proceeding is before the Court on a *writ of certiorari* to review an order of the Circuit Court of Appeals for the Second Circuit, affirming an adjudication in bankruptcy against Diamond Fuel Company by the District Court of the United States for the Southern District of New York.

The question involved in this proceeding is this:

Where the creditors of an alleged bankrupt exceed twelve in number and a petition in involuntary bankruptcy is filed by three alleged creditors, one of whom is proved not to be a creditor, is the petition jurisdictionally defective?

If such a defect exists, can the petition be made good as of its original date by an intervening petition of other creditors filed ten months after the only act of bankruptcy alleged?

The Pleadings.

The petition in bankruptcy was filed on February 25th, 1921, by Pittsburgh & West Virginia Coal Company, H. M. Crawford Coal Company and Boulder Coal Company, who alleged that they had provable claims against the alleged bankrupt, Diamond Fuel Company, in an amount exceeding $500.00. The allegation as to one petitioner was, fol. 7:

"The claim of petitioner, the Pittsburgh & West Virginia Coal Company, is for $8225.10 for 18 cars of coal sold and delivered to the said Diamond Fuel Company on or about the 30th day of October, 1920."

The sole act of bankruptcy alleged was that the Diamond Fuel Company, while insolvent on November 27, 1920, made a transfer of certain real estate to certain creditors.

About March 3d, 1921, the alleged bankrupt filed a verified answer in which, among other things, it denied that Pittsburgh & West Virginia Coal Company had a provable claim against the Diamond Fuel Company. *Record,* fol. 29.

A Receiver was thereafter appointed but no further proceedings were had until September 19th, 1921, when, pursuant to an order of the District Court, two additional creditors, Law & McCue, a co-partnership, and Morgantown Coal Company were joined as petitioning creditors and were permitted to file an intervening petition which

in substance adopted the allegations of the original petition and did not allege any additional act of bankruptcy. *Record*, fols. 34-54.

On September 30th, 1921, the petitioners herein, creditors who had attached property of the Diamond Fuel Co. at Baltimore on October 27th, 1920, almost four months before the petition was filed, appeared in the proceeding, fols. 61-65, and filed answer to the intervening petition, fols. 82-96, and on October 10, 1921, under leave granted by the court, fols. 55-60, filed their answer to the original petition, fols. 67-81. These answers denied among other matters that Pittsburgh & West Virginia Coal Company was a creditor. Fol. 72.

For convenience the petitioners are referred to in this brief as answering creditors.

The Trial.

The case went to trial before Judge A. N. Hand on January 16, 1922. The petitioning creditors moved to amend the petition by alleging that the Diamond Fuel Company had admitted in writing its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground. Fol. 429. That amendment was, however, withdrawn. Fols. 970-973.

The Diamond Fuel Company then withdrew its answer to the original petition and consented to an adjudication. Fols. 434, 438. The trial then proceeded on the issues raised by the answer of the answering creditors.

The petitioning creditors presented their proofs which included the testimony of the Secretary and Treasurer of the Diamond Fuel Company that according to the books of the Company, the Pittsburgh & West Virginia Coal Company was not a creditor. Fol. 497.

The petitioning creditors then rested and the case was stated by the Court to be closed. Fol. 659.

When it was pointed out on the argument that the petitioning creditors had not proved that the Pittsburgh & West Virginia Coal Company was a creditor, fols. 660, 671-675, counsel for petitioning creditors stated, fol. 672, that they could prove the claim at that time. The case was reopened and Thomas F. Barrett, one of the petitioning creditors' counsel, took the stand and attempted to support the claim by his own testimony. Fol. 676.

When it appeared that the witness could not prove the claim petitioning creditors' counsel asked for and obtained an adjournment until January 30, 1922. Fol. 695.

At the same time the Court directed that within five days particulars of the claim of Pittsburgh & West Virginia Coal Company should be furnished to counsel for answering creditors. The Court said, fols. 694-695:

"You will state how the contract was made, whether oral or in writing; and if in writing, produce a copy of the writing; if oral, state when and with whom, and the substance of the oral conversation, and if part one and part the other, combine the two features, and give it in a bill of particulars."

The petitioning creditors failed to give any bill of particulars within the five days prescribed by the Court. Nothing was done by them until January 26th, ten days after the adjournment of the trial, when they served the answering creditors herein with notice of taking depositions in Clarksburg, W. Va., on January 28th. The answering creditors objected to this proposed action and at a hearing before Judge Hand in his chambers on January 27th, Judge Hand directed that any witnesses whom the petitioning creditors might desire to examine should be brought to New York and that the petitioning creditors should furnish by January 28th the bill of particulars that should have been furnished seven days previously. Fols. 705-706.

Again the petitioning creditors failed to comply with the direction of the Court, and when the case was called on Monday, September 30th, the Court granted an adjournment until the next day and at the instance of the answering creditors directed that petitioning creditors should serve their bill of particulars by two o'clock on that date. The bill of particulars was actually served at five o'clock, fols. 704-707, too late to enable the petitioners herein to obtain from Philadelphia proofs to refute certain contentions of the petitioning creditors.

The particulars alleged by the petitioning creditors were entirely at variance with the allegations in the original petition and with the testimony given by Mr. Barrett at the trial on January 16th.

The original petition alleges that the claim of the Pittsburgh & West Virginia Coal Company was for 18

cars of coal sold and delivered to the Diamond Fuel Company on or about the 30th day of October, 1920. Fol. 7.

Mr. Barrett's testimony was to the effect that a written order for 29 car loads of coal had been received by the Pittsburgh & West Virginia Coal Company from the Diamond Fuel Company prior to October 29th. Fol. 679. This statement apparently was wholly untrue.

Quite a different sort of claim is alleged in the bill of particulars. There it is stated in substance that Moore & Company, wholesale coal dealers of Philadelphia, on the 29th of October, 1920, ordered from Pittsburgh & West Virginia Coal Company fifteen cars of coal and agreed to pay therefor $9.00 per ton at the mine; that Moore & Company by telephone conversation with Mr. Tutt, Assistant Secretary of Pittsburgh & West Virginia Coal Company, stated that they were acting in the purchase of the coal for Diamond Fuel Company; that the order for fifteen cars of coal came from Moore & Company by telegram. The telegram, however, did not purport to place the order for Diamond Fuel Company but only for Moore & Company. Fols. 95-105.

The bill of particulars further alleges that after the order of Moore & Company, Pittsburgh & West Virginia Coal Company received an invoice from J. E. Long Coal Company of Clarksburg, West Virginia, for eighteen cars of coal consigned by that Company to Diamond Fuel Company, the eighteen cars of coal being in addition to the fifteen cars ordered by Moore & Company, and that the eighteen cars of coal went forward to Diamond Fuel Company by mistake. It further stated in substance

that thereafter an officer of the Diamond Fuel Company stated that the coal had been received, and that while he did not consider the Company was obligated to do so, it was willing to pay for the coal at four to five dollars per ton, but that Pittsburgh & West Virginia Coal Company refused to accept this proposition. Fols. 106-120.

The petitioning creditors offered hearsay testimony in support of the claim in the bill of particulars. On the most favorable view to petitioning creditors the utmost that can be said about it was that it indicated that 16 or 18 car loads of coal had been sent through error to Baltimore consigned to the Diamond Fuel Company.

Some of the 16 or 18 cars in question may have arrived in Baltimore to credit of Diamond Fuel Co. but that has not been proved, and according to the claim of the petitioning creditors the cars could not have arrived till after Oct. 29.

It is stipulated that all coal that arrived within the jurisdiction of the United States District Court in Baltimore to the credit of the Diamond Fuel Company on the 27th of October or thereafter was covered by the attachments made on behalf of the answering creditors in proceedings in admiralty in Baltimore. Fols. 888, 889.

The answering creditors do not concede, however, that any coal, property of the Pittsburgh & West Virginia Coal Company was covered by the attachment. They said at the trial that they did not claim the right to attach any portion of the 18 cars of coal if it could be shown that the coal had been shipped by Long & Company and by mistake consigned to the Diamond Fuel Company. Fol. 890.

It was stipulated at the trial, fol. 997, that final decrees in Admiralty had been rendered by the United States District Court of Maryland, wherein the answering creditors were adjudged to have a claim and a right to recover against the Diamond Fuel Company in the sum of $165,000. These judgments have been affirmed on appeal, 1923, 288 Fed. Rep. 847, 848.

It was also stipulated at fol. 1002 that part of the claim covered by the judgment of the answering creditors is unsecured by attachment.

During the trial the view of the Court seemed to be that the petitioning creditors had failed to show that Pittsburgh & West Virginia Coal Company was a creditor. At fols. 855, 856, the Court said that the petitioners would have to show some kind of acceptance by the Diamond Fuel Company of coal sent to them by mistake through the Tidewater Coal Exchange.

Again at fol. 860 the Court said:

"You have got to show some acceptance here or an express contract and if you haven't got that you have got to prove that this company or these men who received the coal had promised to pay something or had used the coal or something of that sort."

At fols. 906-908 Judge Hand said that he did not think that an offer by Mr. Watson of the Diamond Fuel Company to pay a price which the others did not agree to take constituted any acceptance of the coal.

At fol. 892, the Court, referring to the attachment in Baltimore, said:

"The Pittsburgh & West Virginia Coal Company, if that is their coal, should go in and fight it."

At fol. 894, the Court said:

"What the Pittsburgh & West Virginia Coal Company should do is to get their interests in the proceeds of that coal determined. * * *"

At fol. 899 the Court said:

"I am inclined to think that the Pittsburgh & West Virginia Coal Company has not a good claim".

At fols. 906-907 the Court said of the coal in question:

"I do not see how the statement which Mr. Watson made that they had accepted it was binding when he did not offer to pay anything for it."

And at fol. 908 the Court expressed the opinion that title to the coal had not passed.

Decision of the District Judge.

Notwithstanding the foregoing, the opinion of the District Judge does not make a definite finding as to the ownership of the coal or whether or not the Pittsburgh & West Virginia Coal Company was a creditor. On the contrary the opinion suggests that on the assumption that the coal in question had been sold under the attachment of the answering creditors at Baltimore and because of the fact that the Diamond Fuel Company at the trial had withdrawn its answer to the original peti-

tion, it was too late to raise any question about the ownership of the coal.

The Court definitely found that any defect in the original petition was cured and made valid from its inception by reason of the intervening petition of creditors with good claims. Fol. 1231.

It is difficult to see how the action of the attorneys for the Diamond Fuel Company at the trial in withdrawing their answer could constitute to any extent a ratification of a transaction with which the Diamond Fuel Company had never had anything to do. They did not order the coal in question. They never got the benefit or use of it. They never agreed to buy it except at a price which was not accepted.

If the coal ever arived at Baltimore and was covered by the attachment and if in fact the coal was not the property of the Diamond Fuel Company the action of the Marshal in attaching it was invalid and could be set aside in proper proceedings by the actual owner of the coal.

If in fact the Pittsburgh & West Virginia Coal Company was the owner of any portion of the coal that was attached at Baltimore they have their remedy, as the District Judge suggested during the trial, fols. 892, 894, in establishing their right against the proceeds of the coal.

This claim of the actual owner of the coal is one of *quasi* contract by reason of the unjust enrichment of somebody through getting the coal by mistake. The Diamond Fuel Company never was enriched by receipt of

the coal and was no more concerned with the transaction than any other stranger.

The Diamond Fuel Company could not be made a purchaser of the coal without its own consent and according to the record it never did consent to become a purchaser.

Certainly no action by the answering creditors in suing out an attachment could grant title to any coal to the Diamond Fuel Company.

We suggest, therefore, that the proofs establish that the Pittsburgh & West Virginia Coal Company was not a creditor of the Diamond Fuel Company and accordingly that the original petition was fatally and jurisdictionally defective because only two of the three parties named as creditors in fact were creditors.

Decision of the Circuit Court of Appeals.

It is evident that the Court of Appeals was not satisfied that the Pittsburgh & West Virginia Coal Company was a creditor. The opinion states, fol. 1293:

"We will assume (but not decide) that one of the three parties who swore to the original petition as creditors, was not in point of fact a creditor at all. This means that the proof of indebtedness was insufficient but the allegation of indebtedness was in point of form perfect."

The Court then found that because the petition was fair on its face it was not jurisdictionally defective and a failure to prove the truth of one of the allegations

with respect to indebtedness to a creditor could be remedied by the subsequent intervention of another creditor so as to make the petition good as of its original date. Fol. 1295.

Yet the Court also stated that an amendment inserting a new act of bankruptcy speaks only from the date of the amendment. Fol. 1294.

The substance and effect of the opinion of the Court of Appeals is simply this:

If the petitioning creditors in this case had stated the truth in their petition, it would have been jurisdictionally defective and would not have withstood a demurrer or could have been dismissed on motion because the requirements of the Statute that three creditors must petition would not have been met.

Yet because the petitioning creditors made an allegation of indebtedness which was in point of form perfect, but in point of fact false, they have been put by the court in a better position than if they had pleaded truly. The court has permitted the falsity of the original petition to be cured by the intervention of other creditors more than ten months after the commission of the act of bankruptcy on which all the petitioning creditors relied.

Clearly, a new petition by three creditors filed on the later date and relying on the same act of bankruptcy would have been jurisdictionally defective as not alleging an act of bankruptcy within four months of their petition.

Neither such creditors nor the original petitioning creditors should be permitted to profit by the false pleading originally filed.

The construction of the statute that was made in this case draws a distinction wholly indefensible in principle between the jurisdictional requirement of allegations with respect to acts of bankruptcy and allegations with respect to indebtedness to petitioning creditors.

If a necessary amendment alleging a new act of bankruptcy speaks only from the date of the amendment, so a necessary amendment or intervening petition containing new allegations of indebtedness should speak only from the date when it was made.

FIRST POINT.

THE ORIGINAL PETITION IS JURISDICTIONALLY DEFECTIVE AND IT CANNOT BE VALIDATED *ab initio* BY THE INTERVENTION OF OTHER CREDITORS MORE THAN FOUR MONTHS AFTER THE COMMISSION OF THE ALLEGED ACT OF BANKRUPTCY.

The question under discussion requires a consideration of Subdivisions (b) and (f) of Section 59 of the Bankruptcy Act of July 1, 1898, Chapter 541, as amended, which are as follows:

"b. Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over, or if all of the

creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt."

"f. Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition."

The opinion of the Circuit Court of Appeals proceeded on this assumption, fol. 1293:

"We will assume (but not decide) that one of the three parties who swore to the original petition as creditors was not in point of fact a creditor at all. This means that the proof of indebtedness was not sufficient but the allegation of indebtedness was in point of form perfect."

The Court then said, fol. 1293 :

"The one question raised by this appeal is whether assuming such lack of proof on the part of one of the three petitioners, the suit or proceeding was validated by the addition of other petitioners who did prove that they were creditors after the expiration of the four months' period."

The Court then suggests that there is a distinction between an amendment or addition to a petition jurisdictionally defective and similar action in respect to a petition which is called jurisdictionally sufficient. Fol. 1294.

The language of the opinion indicates that the Court would consider a petition jurisdictionally sufficient if the allegations were correct in form, although unfounded

in fact. We suggest that this view cannot possibly be correct.

If a petition makes proper allegations of acts of bankruptcy which are entirely without foundation, as proofs only can determine, the petition then is shown to be jurisdictionally defective for it fails to contain the requisites specified by the statute.

In order that such a petition might become jurisdictionally sufficient it would be necessary to make a new allegation of an act of bankruptcy occurring not more than four months previously and establish such act of bankruptcy.

The Court states it as a rule and it is clearly settled that any amendment inserting a new act of bankruptcy speaks only from the date of the amendment. Fol. 1294. We suggest, therefore, that the statement of the opinion is not well founded where it says that the test of a jurisdictional defect is whether or not the petition would withstand a demurrer. Fol. 1295.

The bankruptcy statute must deal with the substance of things and not merely with the appearance. When the statute says that certain things must appear in a petition the requirement necessarily refers to things that really exist and not to mere statements of non-existing things.

A truthful and proper allegation of an actual act of bankruptcy within four months of the petition is one jurisdictional essential. Truthful and proper allegations with respect to three petitioning creditors are another jurisdictional essential. The Court of Appeals has assumed to draw a distinction between two essentials and

in effect has declared that a truthful allegation by three petitioning creditors is not an essential at all.

The requirements of the Bankruptcy Act for a petition in bankruptcy are the same with respect to creditors and the allegation of an act of bankruptcy.

Section 1(a), Subdivision 20, defines a petition as follows:

"Petition shall mean a paper filed in a court of bankruptcy * * * by creditors alleging the commission of an act of bankruptcy by a debtor therein named."

Section 1(a), Subdivision 9, defines the term creditor and Section 59(b) specifies the number of creditors so defined who must join in a petition in involuntary bankruptcy where the number of creditors is more than twelve.

Section 3(a) and 60(a) define what shall constitute an act of bankruptcy.

The intent of the Bankruptcy Act, therefore, appears to be that in order to constitute a valid petition in bankruptcy it is essential that it be filed by creditors as defined in the Act and that it shall allege an act of bankruptcy as defined in the Act. Unless both of these essentials exist there is no petition at all. The one is as important as the other and if the failure to allege an act of bankruptcy is a jurisdictional defect, the absence of the necessary number of petitioning creditors must be equally a jurisdictional defect.

If the provision of the Bankruptcy Act that three creditors shall join in a petition is jurisdictional and if one of the parties who have joined is not in fact a cred-

itor, the jurisdictional defect none the less exists although it may not be apparent on the surface. Such a defect would not be removed by the failure of the alleged bankrupt or an answering creditor to raise the question before adjudication. An adjudication in such circumstances would not be perfectly valid, but would be open to attack on jurisdictional grounds in any direct proceeding. The Court of Appeals appears to have lost sight of the distinction between such jurisdictional defects as will expose a judgment to collateral attack, and those which can only be attacked directly.

The situation is quite analogous to that of a suit brought in a Federal Court where the jurisdiction depends entirely on diversity of citizenship. The complaint would certainly not be demurrable if the allegations with respect to citizenship were proper, nor in the absence of fraud or collusion, would a judgment obtained in such action, after a hearing and determination of the issues, be open to collateral attack. *Des Moines Navigation, etc. Co.* v. *Iowa Homestead Co.*, 1887, 123 U. S. 552; *Noble* v. *Union River Logging Co.*, 1893, 147 U. S. 167; *Lacassagne* v. *Chapuis*, 1892, 144 U. S. 119; *New Orleans* v. *Fisher*, 1901, 180 U. S. 185. Nevertheless it cannot be doubted that the court would have to dismiss the suit for lack of jurisdiction, if the necessary diversity does not exist in fact, and the defect appears in the course of the proceedings.

The answering creditors submit that the requirement of the Bankruptcy Act that there shall be three petitioning creditors is a jurisdictional one with all its attributes. If the question is raised by answer before adjudication or

by any direct proceeding even after adjudication and it is established that less than three creditors have petitioned, the petition must fail for want of jurisdiction. That being true, the intervention of other creditors thereafter can validate the proceeding only from the time the petition becomes a sufficient one by such intervention.

The jurisdiction of the Bankruptcy Court is entirely dependent on the Statute, and to the extent that the provisions of the Statute are designed to take away vested rights, they should be strictly construed.

The answering creditors by virtue of their attachment proceedings at Baltimore obtained vested rights of property which in the ordinary course of law they would be entitled to enjoy; but if an adjudication in bankruptcy is upheld in accordance with the opinion of the Circuit Court of Appeals it will be asserted by the trustee in bankruptcy that their attachments must fall by reason of the fact that they were obtained within four months of the filing of the petition in bankruptcy.

This is not a case in which one creditor has secured an advantage over other creditors by virtue of the consent or aid of the alleged bankrupt. But such advantages as have been obtained have resulted to the answering creditors by reason of their diligence in the assertion of their ordinary legal remedies. They should not be deprived of those rights through the medium of a drastic statute unless the specific requirements of the Statute are strictly complied with.

The bankruptcy act abrogates the ordinary rights of creditors in certain circumstances. As in the case of for-

eign attachment, garnishment and distress proceedings, parties should comply strictly with the requirements of the Statutes, if they are to invoke successfully the jurisdiction of the court. This feature of the law was pointed out by Hazel, J., in *In Re C. Moench & Sons,* W. D. N. Y. 1903, 123 Fed. 977, where, after discussing the rights of an attaching creditor to answer an involuntary petition, he said at page 978:

"Those rights are sought to be wrested from it pursuant to a Statue in derogation of his general common law rights, and cannot be wiped away without a hearing."

It is settled law that the requirement of the Statute with respect to the number of petitioning creditors is jurisdictional.

In *Cutler* v. *Nu-Gold Ring Co.,* 264 Fed. 836, C. C. A. 8th Cir. 1920, Sanborn, J., at p. 838 said:

" * * * the law is now settled beyond dispute that the existence of three provable claims held by three petitioners, respectively, of the alleged bankrupt, and, if challenged by pleading, plenary proof thereof is jurisdictional and indispensable to the maintenance of an involuntary petition in bankruptcy."

The subsequent intervention almost ten months after the alleged act of bankruptcy of a sufficient number of qualified creditors cannot validate *ab initio* an involuntary petition which is jurisdictionally defective because of a deficiency of qualified petitioners.

The only possible theory on which the original petitioners and the intervening petitioners in this case can

proceed is that the original petition, though invalid as filed, is somehow rendered valid from the beginning by amendment or intervention. This theory must fail unless authorized by necessary implication from the express provisions of the statute.

If the jurisdictional requisites were in fact absent the original petition was a dead thing and had neither actual nor potential life. If this is not so then a petition filed by only one creditor, or indeed by three alleged creditors who are not proved to be creditors, becomes a perfectly good petition from the date when it was filed, if subsequently, no matter how long thereafter, two or more actual creditors intervene in the proceedings.

Respondents rely on Section 59f of the Bankruptcy Act which is as follows:

"Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition."

The joinder permitted by this section can only refer to an existing petition. If there is not any proceeding before the Court, as is the case where the petition is proved to be jurisdictionally defective, the intervention must stand, if at all, as a new proceeding. Section 59f merely confers on creditors a privilege to become parties, so that they may be represented at the trial of the issues and have a hand in carrying on a going litigation. It does not contain anything which contravenes the principle that parties plaintiff in a cause cannot by their own

action comply retroactively with jurisdictional requirements.

The proceeding in this case was a nullity until the intervening petition was filed. Then, for the first time, three qualified petitioning creditors were before the court.

These principles are supported by authority.

The decision by the Circuit Court of Appeals for the Eighth Circuit in *Despres* v. *Galbraith,* 1914, 213 Fed. 190, is directly in point. That was a case where an involuntary petition was filed by three creditors who had previously assented to a general assignment whereby they expressly released the alleged bankrupt from liability. More than four months later, an intervening petition was filed by three qualified creditors. The District Court ordered an adjudication as of the date of filing the original petition. The Circuit Court of Appeals held that the intervening petition must be considered as an original petition as of the date of the intervention that the adjudication could only be based on the intervening petition and that certain alleged preferences, given within four months of the filing of the original petition but more than four months before the intervening petition, could not be disturbed. At page 193, the Court said:

"The bankruptcy act authorizes the filing of a petition in bankruptcy by creditors of the bankrupt. If the creditors are less than twelve in number, one creditor may file the petition; if more than twelve, then three or more creditors must join; . . . We are of the opin-

ion that the petition of February 1, 1912, was void for the want of proper petitioners. That being true, the intervening petitions could draw no support from it."

Trammel v. *Yarbrough*, 1918, 254 Fed. 685, decided by the Circuit Court of Appeals for the Fifth Circuit, presented a situation closely analogous to the case at bar. There, an involuntary petition was dismissed for want of prosecution, but in the order of dismissal the right was reserved to any other creditors to intervene and have the matter reopened within thirty days. A sufficient number of qualified creditors intervened within the thirty days but more than four months after the act of bankruptcy alleged. The district court rendered an adjudication of bankruptcy. This was reversed. Walker, Circuit Judge, said at page 687:

"A reopening of the proceedings to let in other creditors to carry it on, after the elimination from it of all who had previously been actors in it, was in necessary effect the institution of a new proceeding."

The courts have applied a similar rule to cases where the original petition was defective as to its allegations of the act of bankruptcy.

In *In re Condon*, C. C. A., 1913, 209 Fed. 800, Judge Lacombe, after disposing of the original petition as being jurisdictionally defective because of the insufficiency of the allegations of the act of bankruptcy, said:

"Thereafter, on May 25, 1911, the petition was amended by setting forth the details of twelve separate transactions of the kind charged in the original peti-

tion. Since the petition became a sufficient one only when it was fortified with this amendment, the date of the amendment must be taken as the date from which the four months period of Section 3b is to be calculated. This eliminates all of said alleged transactions except the last four."

Judge Hough covered the same point by his observations in *In Re Havens,* C. C. A., 1918, 255 Fed. 478, 481:

"It was assumed below that this was an act of bankruptcy not set forth in the original petition and only charged in and by an amendment made more than four months after its commission. Whether such an act, occurring more than four months before amendment, could be introduced into a pending proceeding, was thought an 'interesting question' by Lacombe, J., in the Riggs case, supra.

"This court answered it in the negative, In re Haff, 136 Fed. 80, 68 C. C. A. 646, the matter not having been covered by In re Sears, 117 Fed. 294, 54 C. C. A. 532, which was correctly explained and limited in application by Gleason *v.* Smith, 145 Fed. 897, 75 C. C. A. 427. The general rule as stated in the Haff Case has been approved, especially in the Ninth Circuit (Walker *v.* Woodside, 164 Fed. 685, 90 C. C. A. 644), and in the Seventh (In re Brown Commercial Car Co., 227 Fed. 390, 142 C. C. A. 83). Our own decision (In re Condon, 209 Fed. 801, 126 C. C. A. 524) is (in this respect) but a reassertion of the Haff Case.

"This rule rests in theory upon the reasoning of Justice Nelson In re Craft, 6 Blatchf. 177, Fed. Case No. 3,317, where it was pointed out that 'to allow a substantial amendment—that is, one going to the whole foundation of the proceeding *nunc pro tunc*—would be a direct

violation of a limitation 'obviously for the benefit of the debtor,' namely, the requirement that proceedings must be brought within a limited time after the act of bankruptcy is committed; i. e., under the present statute, four months."

In the *Triangle Steamship Co.* case, 1920, 267 Fed. 303, a petition had been held defective for insufficiency of allegations of acts of bankruptcy. An amended petition was filed by the same petitioners. On demurrer this amended petition was dismissed. Judge Mayer said, p. 303:

"The transactions then set forth are the only ones specifically stated to have occurred more than four months prior to the filing of the amended petition but apparently within four months prior to the filing of the original petition. The question then is whether for the purpose of calculating the four months the date is that of the original or that of the amended petition.

"It is settled by authority."

Judge Mayer then quotes from the *Condon* and *Havens* cases and cites *In re Louisell Lumber Co.*, C. C. A. 5th Cir. 1913, 209 Fed. 784.

In *In re Louisell Lumber Company*, C. C. A. 5th Circ., 1913, 209 Fed. 784, the original petition was defective in failing to allege any act of bankruptcy as required by the statute. After more than seven months had gone by the creditors were permitted to amend their petition by setting up an act of bankruptcy consisting of an admission by the bankrupt of inability to pay debts. An adjudication was then entered and the trustees sought to

set aside a levy that had been made within four months of the filing of the original petition but more than four months before the filing of the amended petition. The Court of Appeals held that the amendments did not relate back to the time of filing of the original petition and that the attachment could not be set aside. The Court said, p. 787:

"But the doctrine of relation back is not applicable where the amendment sets up a new cause of action, or where to cause it to relate back would have the effect of depriving an adverse party of a substantial right on which no attack was made in the original pleading. * * *

"It would defeat the intention of the bankruptcy act if creditors could file a blank or skeleton petition against their debtor, alleging no act of bankruptcy, and, after a lapse of more than four months, amend it by filling up the blanks, alleging acts of bankruptcy, and have the amendment relate back in its effect for a period of over eight months to a time within four months before the filing of the blank petition, and dissolve valid liens then existing on the bankrupt's property. And it would clearly conflict with the act to permit such defective petition to be made effective by the debtor's acknowledgment of insolvency and willingness to be adjudicated a bankrupt, made by him over four months after such defective petition is filed, and cause such confession, when alleged by amendment, to relate back in its effect more than eight months so as to dissolve valid liens on the bankrupt's property then existing. If a petition alleging no act of bankruptcy may lie dormant for more than four months, and then by amendment be given retroactive vitality, cancelling liens made secure by the four months' limitation, the same effect would be given

the amendment of such a petition made twelve months after it was filed, thereby annulling liens that had attached sixteen months before the amendment. We cannot approve a procedure that leads to such results. It would be destructive of rights intended to be preserved by the four months' limitation."

It would be even more objectionable to permit persons who are not creditors to file a petition, allow it to remain dormant for more than six months, and then on the intervention of qualified creditors, to hold that the petition so amended took effect as of the time of the original defective petition was filed, with the consequences suggested in the language just quoted.

The Circuit Court of Appeals considered the case of *In re Bolognesi*, 223 Fed. 771, decided by it in 1915, a controlling authority against the contention of the attaching creditors. The actual decision on the facts of the case is not inconsistent with the principles we have pointed out above. From the facts stated by the court, it appears that, although the original petitioners were estopped by reason of their participation in a general assignment, other and qualified creditors intervened in the petition within four months of the act of bankruptcy. While the proceeding was in this condition, the intervention occurred by still other qualified creditors, more than four months after the act of bankruptcy. The proceeding was a valid one, therefore, when the latest group of creditors intervened. The District Court, considered that the petition should be dismissed on the ground that all the qualified creditors who had intervened within the four months' period had withdrawn,

and that jurisdiction attached only as of the time of the intervention of the creditors who remained in the case.

The reasoning of Judge Lacombe in that case also plainly shows that he considered that intervention in a void petition, more than four months after the act of bankruptcy alleged, could not save it. He took the position that the original petitioners were in law creditors who were capable of initiating proceedings and that there was a pending proceeding when the intervention occurred.

It may be that a creditor who has a valid claim against the alleged bankrupt has sufficient standing in an involuntary proceeding to be counted as one of the petitioning creditors, although he is estopped from relying on the alleged act of bankruptcy for an adjudication. Creditors not so estopped subsequently coming in at any time might rely on the act of bankruptcy so alleged.

If, however, the scope of the decision goes to the extent suggested by the Court of Appeals in this case, we submit that it is fundamentally wrong. If one nonexistent creditor could join in an original petition with two actual creditors so as to make the petition valid at its inception, although not complying with the requirements of the Act, the same result would follow if two or all three petitioning creditors were not actual creditors.

Certainly the Bankruptcy Act cannot sanction the filing of a petition by bogus creditors whether the number be one, two or three. Yet such a result apparently would be possible under the decision of the Court of Appeals in this case, for they said, fol. 1295:

"But where the defect will appear only through failure of proof, e. g. in respect of evidence of indebtedness, any qualified creditor or creditors may come in, pick up and carry forward the petition which its original proponents are not able or willing to do."

The suggestion of the Court is not persuasive that otherwise it would often be an easy matter when four months had elapsed after the act of bankruptcy to induce or persuade one of the petitioning creditors to default upon his claim and thus avoid adjudication. That possibility, of course, may exist at any time whether it concerns the proof of indebtedness or the proof of an act of bankruptcy.

It would be a much more serious situation and one more provocative of fraud if bogus creditors could file a petition and more than four months after the act of bankruptcy complained of *bona fide* creditors could intervene and make good a petition as of a date when they had not acted.

The answering creditors submit that the construction of the Bankruptcy Act made by the Court of Appeals for the Eighth Circuit in *Despres* v. *Galbraith* and by the Court of Appeals for the Fifth Circuit in *Trammell* v. *Yarborough* is correct in principle and should prevail over the ruling by the Court of Appeals in the present case.

LAST POINT.

THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT SHOULD BE REVERSED AND THE CAUSE REMANDED WITH INSTRUCTIONS TO VACATE THE ADJUDICATION AND DISMISS THE PETITION IN BANKRUPTCY.

Respectfully submitted,

CHARLES R. HICKOX,
D. M. TIBBETTS,
Counsel for Answering Creditors.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

No. 72

CANUTE STEAMSHIP COMPANY, LTD., AND COMPANIA NAVIERA SOTA Y AZNAR, *Petitioners,*

vs.

PITTSBURGH AND WEST VIRGINIA COAL COMPANY ET AL., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS.

THOS. F. BARRETT,
Attorney for Respondents.

NASH ROCKWOOD,
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R. R. BENNETT,
T. L. JEFFORDS,
of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

No. 72

CANUTE STEAMSHIP COMPANY, LTD., AND COMPANIA NAVIERA SOTA Y AZNAR, *Petitioners,*

AGAINST

PITTSBURGH AND WEST VIRGINIA COAL COMPANY ET AL., *Respondents.*

BRIEF FOR RESPONDENTS

Pittsburgh and West Virginia Coal Company, H. M. Crawford Coal Company and Boulder Coal Company.

The matter sought to be reviewed is an order of adjudication entered by Judge Augustus N. Hand, a judge of the United States District Court for the Southern District of New York, in the above-entitled cause, and unanimously affirmed by the Circuit Court of Appeals for the Second Circuit, with Hough, Manton and Mayer, J. J., sitting, opinion by Hough, J.

FACTS

1. Prior to October 27, A. D. 1920, the alleged bankrupt was engaged in the business of mining and shipping coal from coal mines owned by it, located in West Virginia, and in purchasing coal from other coal operators for export. Its principal office was located at 25 West 43d Street, in the City of New York.

2. On the 27th day of October, A. D. 1920, the Canute Steamship Company, Ltd., and Compania Naviera Sota y Aznar (the petitioners) instituted in the United States District Court for the District of Maryland, against the alleged bankrupt, a suit in admiralty based upon an alleged breach of Charter Party, and in that proceeding secured an attachment against a large amount of coal held by the Tidewater Coal Exchange at Baltimore, to the credit of the alleged bankrupt. This coal was sold by agreement of all the parties to the admiralty proceeding and the money realized therefrom, amounting to $110,000.00 in cash, is impounded by the United States District Court for the District of Maryland, pending the final determination of this case.

3. On November 27, A. D. 1920, the alleged bankrupt deeded to one Charles S. Chestnut, of Philadelphia, all of its coal lands, mining properties, and personal property located in West Virginia. (Record, pp. 344, 358 and 374.) The said Charles S. Chestnut thereafter, on January 27, A. D. 1921, deeded the same properties to the Barbour-Lewis Coal Company, a corporation formed under the laws of West Virginia. (Record, p. 366.) On the 25th day of February, A. D. 1921, within four months from the date of the said writ of attachment, and also within four months from the date of the execution and recording of the said

deeds, the Pittsburgh & West Virginia Coal Company, H. M. Crawford Coal Company, and Boulder Coal Company, creditors of the alleged bankrupt, filed in the United States District Court for the Southern District of New York, an involuntary petition in bankruptcy against it, and alleged in the petition that the transfers above referred to were made while the alleged bankrupt was insolvent for the purpose of preferring certain creditors who are named in the petition, leaving the petitioning creditors and other creditors of the same class unpaid. Thus preferring the claims of those who obtained the benefit of the preferential deeds, over the petitioning creditors and other creditors of the same class.

A few days after the filing of said involuntary petition, John B. Johnson, Esq., a member of the New York Bar, was, by the United States District Court for the Southern District of New York, appointed receiver of the alleged bankrupt in this cause. Subsequently Judge Pritchard (then Presiding Judge of the Fourth Judicial Circuit) appointed W. H. Cochrane ancillary receiver for the property of the alleged bankrupt located within the jurisdiction of the United States District Court for the Northern District of West Virginia.

On the 3d day of March, A. D. 1921, the alleged bankrupt filed an answer to the petition, denying the act of bankruptcy and its insolvency. On the 19th day of September, A. D. 1921, the Morgantown Coal Company, a corporation, and Law & McCue, a firm of practicing lawyers of Clarksburg, West Virginia, by leave of the Court, filed intervening petitions as creditors of the alleged bankrupt and joined in the original petition.

On the 30th day of September, A. D. 1921, the op-

posing creditors, the petitioners here to wit, Canute Steamship Company and Compania Naviera Sota y Aznar, by leave of the Court, filed an answer claiming they are creditors of the alleged bankrupt and denying the allegations in the original and intervening petitions.

4. The case was tried in the United States District Court for the Southern District of New York and concluded on the 1st day of February, A. D. 1922, Judge Augustus N. Hand presiding. When the case was called and before other proceedings were had, a member of the New York Bar appeared in Court and presented a certified copy of resolutions passed by the Board of Directors of the alleged bankrupt, assented to in writing by all of its stockholders, authorizing its attorney to withdraw its answer and all opposition to its adjudication as a bankrupt.

The case then proceeded upon the issues alone raised by the answer of the two attaching opposing creditors (the petitioners here). As a result of the trial an order of adjudication in bankruptcy was entered by Judge Hand. (App. p. 409.) From this order an appeal was taken by the opposing creditors (the petitioners here) to the United States Circuit of Appeals for the Second Circuit, which Court by its decision sustained the order of adjudication. (Opinion by Judge Hough, App. p. 431.)

From the judgment of the Circuit Court of Appeals the opposing creditors (the petitioners here) applied to this Honorable Court for a writ of certiorari to the said Circuit Court which was granted, and the case is now here for final determination.

OUTLINE OF ARGUMENT

This case was ably tried by the District Court, Augustus N. Hand, District Judge, presiding. He gave the opposing creditors the widest latitude to produce evidence sufficient to convince the Court that an order of adjudication in bankruptcy should not be granted at the conclusion of the trial but after holding the case for some days for consideration, the District Judge entered the order of adjudication and in the opinion (App. page 409) found that all of the creditors who signed the original petition had valid claims. The objection raised by the opposing creditors to the validity of the claim of the Pittsburgh and West Virginia Coal Company was not sustained by the District Judge, but on the other hand his opinion is to the effect that the claim of that creditor is entirely valid.

The evidence establishes beyond all question that at the date the petition was filed the alleged bankrupt was hopelessly insolvent. Its total available assets were less than $250,000, while its indebtedness approximated $1,000,000, or more. The testimony of Gardiner Yerkes, Secretary-Treasurer of the alleged bankrupt (page 158 of the record) is conclusive on this point. His testimony sets forth in detail the obligations of the alleged bankrupt and declares that at the time of the filing of the petition it was unable to meet its current obligations. However, the alleged bankrupt itself by resolutions duly passed by unanimous vote of its directors and assented to in writing by all of its stockholders, authorized its counsel to appear in Court (which he did before the trial), and present the said resolutions to the Court in certified form authorizing its counsel to withdraw its answer theretofore filed, and to admit all of the allegations contained in the orig-

inal petition including the act of bankruptcy and insolvency.

In the absence of fraud or collusion between the petitioning creditors and the alleged bankrupt (and there was absolutely no mention of any such thing in the entire proceeding) the strongest possible evidence as to the Act of Bankruptcy and the insolvency of the alleged bankrupt is its own admission, made by its counsel in open court when he withdrew his client's answer. The answering creditors who object to the adjudication in bankruptcy and who are the petitioners here, cannot possibly supply evidence that would impeach these admissions of the alleged bankrupt itself and especially when coupled with the testimony of its officers given in open court at the trial before Judge Hand.

In addition to the admissions of the alleged bankrupt and its officers, the testimony of each one of the creditors whom it is charged were preferred was taken (see Record testimony), and each one of them testified that the purpose of the preferential transfer of the coal properties in West Virginia was for the purpose of protecting and securing them as to large amounts of money due them from the alleged bankrupt. In other words, the testimony of the preferred creditors themselves, freely given, establishes the fact that all of the coal property of this alleged bankrupt, which was all the property it had except book accounts and personal property, was transferred to an individual—one Charles S. Chestnut, of Philadelphia, for the purpose of retransferring the same property to a coal corporation formed under the laws of the State of West Virginia, which was owned entirely by these preferred creditors and which was organized for the purpose of

taking over these coal properties for the benefit of the preferred creditors. This is all entirely and completely admitted by the alleged bankrupt itself, and by the preferred creditors, and is not denied from any source whatever.

The contention raised by the answering objecting creditors that the Pittsburgh and West Virginia Coal Company, one of the creditors who signed and swore to the original petition, did not have a valid claim, is entirely refuted by the evidence and by the judgment of the District Judge, who tried the case. The facts disclosed at the trial by oral testimony and by documentary evidence is to the effect that this creditor received through a brokerage house in Philadelphia,—who was authorized to purchase coal for the alleged bankrupt,—an order for fifteen cars of coal to be consigned to the Diamond Fuel Company, the alleged bankrupt, at Curtis Bay Piers, Baltimore, Md., to be there loaded on vessels and exported to Europe. The evidence is to effect that this corporation, the alleged bankrupt, was at that time engaged in purchasing coal on a very large scale and exporting the same to Europe. This was in the year of 1920, shortly after the close of the World War. At that time there was an enormous demand for coal in Europe, which induced a large number of coal companies to engage in the business of exporting coal, and as a result prices advanced to unheard of figures for coal at the mine. The order was received by the Pittsburgh and West Virginia Coal Company for the fifteen cars of coal on the 29th of October, 1920. By mistake at the mine from which the coal was ordered shipped, thirty-three cars of coal were shipped in one shipment instead of fifteen. In other words, the order was overshipped by eighteen

cars. The brokerage firm in Philadelphia which ordered the shipment of the fifteen cars refused to pay for the excess of eighteen cars. The coal, however, went forward in one complete train load. It was all received at the Curtiss Bay Piers at the same time and was credited by the Tidewater Coal Exchange to the Diamond Fuel Company, the alleged bankrupt. The coal was promptly dumped and of course mingled with other coal consigned to the alleged bankrupt. It was a matter of several weeks after this mistake had been made before it was discovered that the order had been overshipped to the amount of eighteen cars. Officers of the Pittsburgh and West Virginia Coal Company brought the matter to the attention of the Diamond Fuel Company, the alleged bankrupt, and they checked up the coal received through the Tidewater Coal Exchange at Curtis Bay Piers and found that this coal had actually been delivered to it and that it had actually received and used it. Thereupon, the question of the payment for the same came up. The Diamond Fuel Company, the alleged bankrupt, agreed to pay for it, but there was a dispute as to the price it was willing to pay. That Company offered $5.00, whereas the Pittsburgh and West Virginia Coal Company, the petitioner and creditor here, maintained that inasmuch as they had received the coal, had accepted it and used it in the same manner in which they used the fifteen cars that were actually ordered, that they should pay for it at the same price. While these negotiations were going on, it was brought to the attention of the Pittsburgh and West Virginia Coal Company, the petitioning creditor, that all of the coal to the credit of Diamond Fuel Company, the alleged bankrupt, in the Tidewater Coal Exchange, had been attached in an ad-

miralty proceeding brought in the United States District Court by the Canute Steamship Company and the Compania Naviera Sota y Aznar, who are the same steamship companies which are the answering objecting creditors in this proceeding. It was disclosed that this proceeding in admiralty was for a very large amount of money for demurrage and other charges against the Diamond Fuel Company, alleged bankrupt. The coal to the credit of the Diamond Fuel Company was by agreement of all the parties to this admiralty proceeding sold and converted into cash and the sum of $110,000 was realized therefrom and the money was placed in the hands of a trustee by the Judge of the United States District Court for the District of Maryland and has ever since been impounded by the Court awaiting the outcome of legal proceedings.

This put the creditor, the Pittsburgh and West Virginia Coal Company, upon inquiry as to the financial condition of the Diamond Fuel Company, alleged bankrupt, and this investigation disclosed the fact that not only had this attachment in the admiralty proceeding in Baltimore been sued out and all of its liquid resources tied up thereby, but that the alleged bankrupt had actually entered into an arrangement with five or six of its largest creditors to which it owed several hundred thousand dollars, by which it deeded all of its coal mining properties to one Charles S. Chestnut, of Philadelphia, who in turn had deeded the same properties to a corporation known as the Barbour-Lewis Coal Company, which was newly formed for the purpose, and the only purpose, of taking over and holding title to these properties for the benefit of the preferred creditors before referred to. Thus on the one hand it was discovered that all of its liquid as-

sets were tied up by this attachment proceeding, while all of its physical properties had been transferred to a corporation organized by certain of its large creditors for the purpose of taking over the title to the properties to protect them in the amount of the obligations which the alleged bankrupt owed them. Upon discovering this condition of affairs, the Pittsburgh and West Virginia Coal Company placed its claim in the hands of counsel who proceeded with a further investigation and got in touch with the officers of the Diamond Fuel Company, the alleged bankrupt, with the result that no satisfaction could be obtained and finally a conference of creditors whose claims were put in jeopardy by these acts of the alleged bankrupt decided in order to protect their interests that it would be necessary to apply to the courts for the appointment of a receiver for the property and assets of the alleged bankrupt and this bankruptcy proceeding was begun in the United States District Court for the Southern District of New York on the 25th day of February, 1921, as a result.

THE LAW

The most important point of law involved in this case arises out of construction by the District Court and the Circuit Court of Appeals of Sec. 59f of the National Bankruptcy Act, viz:

> "Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition."

The District Court in its opinion deciding the case, in part said:

"Moreover, intervening creditors with good claims have cured any defect in a petition which was sufficient on its face, and these creditors make the original petition valid from its inception, *if there was a defect in the claim of one of the original.*" (Italics ours.)

"The case is not like that of an original petition which was invalid on its face, in Re Stein, 105 Fed. 749; and in Re Triangle Steamship Company, 267 Fed. 300, is distinguishable upon this ground."

In deciding adversely to the opposing creditors their contention that one of the creditors which signed the original petition did not have a valid claim, the District Court, opinion by Judge Hand, is as follows:

"Only one of them, the Pittsburgh & West Virginia Coal Company, is said not to be a valid creditor. Its claim is for eighteen cars of coal shipped by mistake. * * * The objecting creditors attached this coal by process of foreign attachment in a suit in admiralty against the Diamond Fuel Company and sold it with other coal in that proceeding. I think it is too late, after taking such a step, to offer at the trial to release their attachment against the eighteen carloads, or their proceeds. They cannot restore the parties to their original position by returning the coal sold under process in admiralty, and the Diamond Fuel Company has never attempted to do this, and by withdrawing its answer has ratified the transaction so far as possible."

The Circuit Court of Appeals in its opinion by Judge Hough says:

"This unduly voluminous record presents but one point necessary for decision."

The point referred to in the foregoing quotation from the opinion of the Circuit Court of Appeals refers to another point decided by Judge Hand, namely: that two other creditors having undisputed claims had intervened, as they were entitled to do, under Section 59f of the Bankrupt Act.

Neither the District Court nor the Circuit Court considered it necessary to go beyond this one point. It was admitted at the trial, and is admitted in the petition of the opposing creditors to this Court, that at least four creditors having valid and undisputed claims had joined in the petition prior to the trial.

There was no demurrer interposed, and both the District Court and the Circuit Court found no objection to either the form or the substance of the original petition. On the contrary, the latter Court said in its opinion:

> "But in this case the original petition was not jurisdictionally defective; it might fail for lack of proof of many things, e. g., that it was brought by three *bona fide* creditors. But it would have withstood a demurrer, and an unopposed adjudication based thereon would have been perfectly valid."

The three judges who heard and decided the case in the Circuit Court, and the trial judge, are unanimous in their decision upon the point of law involved. And the same point so decided in this case has likewise been decided by the same Circuit Court (2nd Cir.) in Re Bolognesi, 223 Fed. 771, where the rule was stated:

> "A petition in involuntary bankruptcy, valid on its face, gives the court jurisdiction, and other creditors may, under the Bankruptcy Act July 1, 1898, c. 541, Sec. 59f, 30 Stat. 561 (Comp. St. 1913,

Sec. 9643), intervene, though by lapse of time they are barred from originating a proceeding, for their adoption of the original petition relates back to the date it was filed."

The same point was decided in Re Stein, 105 Fed. 749-51, Circuit Court of Appeals, Second Circuit. The Court, commenting upon the joinder of additional petitioning parties, said:

"And, even if imaginable cases of hardship may arise, the plain language of the act, authorizing creditors 'at any time' to join in the original petition, can not be disregarded."

The United States District Court for the District of Delaware decided the same question in Re Mackey, 110 Fed. 355, as follows:

"As insufficiency in the number of the petitioning creditors is not an incurable jurisdictional defect, by parity of reasoning insufficiency in the amount of provable claims of such creditors can not be held such a defect; for the bankruptcy act equally requires sufficiency in number and sufficiency in amount in order that the petition may be sustained. Clause 'f' was evidently intended to correct defects of either kind at any time during the pendency of the proceedings, whether before or after the expiration of four months from the alleged act of bankruptcy. This construction of the clause is in harmony with its language, is calculated to protect the interests of creditors, and involves no hardship to the defendant."

The United States District Court for the District of Arkansas, in Re Mammouth Pine Lumber Company, 109 Fed. 308, decided the same point in the following language:

"There is no pretense in the case at bar that the Ft. Smith creditors were sham creditors. When they filed this petition, they were acting in good faith, an antagonistic to the Mammouth Pine Lumber Company. So that on the face of the proceedings there can be no doubt, if the cases cited above are sound, the proceedings should stand, and the creditors who made themselves parties to the proceedings, after the expiration of the four months, should be taken into consideration in determining whether or not the necessary number of creditors and amount of indebtedness existed upon which the Mammouth Pine Lumber Company could be adjudicated a bankrupt."

In the Eighth Circuit the same question has likewise been settled in Corwith Bank v. Haswell, 174 Fed. 209 (C. C. A. 8th Cir.). There the Court held that an amendment to an involuntary petition in bankruptcy whereby other creditors intervene and join therein, relates back to the filing of the original petition and does not advance the date of the filing.

On page 210 the Court said:

"The contention is that, as the original petition was defective for want of parties, the adjudication on that petition as amended, and the order relating the amendment back to the date of the original petition, was erroneous. The importance of this contention for the bank rests in this: If the 'filing of the petition' within the meaning of section 60 of the bankruptcy act, concerning unlawful preferences, has relation to the filing of the original petition only, the preference which the bank received would be defeated because less than four months had then elapsed since it was given. If, on the contrary, it has relation to the filing of the amendment, as in this case, the preference would be protected, because more than four

months had then elapsed. *This contention is always untenable.* Section 60a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445) as amended by Act Feb. 5, 1903, c. 487, 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1909, p. 1314), provide that:

> 'A person shall be deemed to have given a preference if being insolvent he has within four months before the filing of the petition * * * made a transfer of any of his property,' etc.

"The amendment as made in this case did not constitute 'the petition' within the meaning of Section 60. It did not by its terms purport to be a petition. It alleged no new act of bankruptcy. It consisted merely in striking out such allegations of the original petition and substituting such other allegations as were requisite to show the joinder of the necessary parties, authorized by Section 59d, and their status as creditors. The original petition then remained as if all the averments of the amendment had been bodily incorporated in it.

"Congress, by the provisions of Section 59, which seems to have been enacted to meet just such condition of things as is disclosed by this record, very manifestly intended, not that the original petition should be supplanted by the amendment there provided for, but that it might be supplemented by the joinder of other necessary creditors. This is made clear, not only by the provisions of subdivision 'd' but by the provisions of subdivisions 'e' and 'f' of the same section. They all contemplate the retention of the original petition as the pleading upon which subsequent proceedings should be had."

This opinion expressed by the Circuit Court of Appeals for the Eighth Circuit is in harmony with its opinion upon the same point of law in Despres v. Galbraith, 213 Fed. 190, *being the case cited by the pe-*

titioners here to show the diversity of opinion between the courts of the Second Circuit and the Eighth Circuit; but no such diversity of opinion exists, as is clearly shown by the language of the Court:

> "It has been repeatedly decided by this Court that where a petition was defective merely, as for example, where a petition was filed by one creditor only who alleged that the debtor had less than twelve creditors known to him, and it was subsequently discovered that there were more than twelve creditors, and therefore the petition must be filed by more than one creditor, the requisite number of creditors might joint with the original petitioner prior to adjudication, and that in such case the 'filing of the petition' within the meaning of the Bankruptcy Act would relate back to the date of the filing of the original petition by the one creditor. (First State Bank v. Haswell, 174 Fed. 209, 98 C. C. A. 217, and cases there cited.)"

> "The three creditors filing the first petition were absolutely disqualified from filing an involuntary petition in bankruptcy by reason of becoming voluntary parties to the assignment contract, as much so as if they had been strangers to the entire proceeding; and it would not be contended, we take it, by anyone that strangers—that is, parties having no claims against a bankrupt—could file a petition against him that would have any validity whatever. The reason given in the cases for denying to one who has become a voluntary party to an assignment contract the right to file an involuntary petition in bankruptcy, basing it upon the assignment as an act of bankruptcy, is that to permit him to do so would be to permit him to take advantage of his own wrong and enable the unscrupulous to entrap a person into involuntary bankruptcy; and it is for this reason that a person who has placed himself in that position is uni-

formly held to be estopped to set up an assignment for the benefit of creditors as a ground for adjudging the assignor a bankrupt. This rule does not in any degree tend to affect or defeat the object of the Bankruptcy Law, for as was said by Judge Taft in Simonson v. Sinsheimer, 95 Fed. 948, 37 C. C. A. 337:

> 'The estoppel we are considering, if recognized and enforced, does not affect or detract from the paramount character of bankruptcy proceedings, when properly begun, but only prevents the institution of such proceedings by persons who were privy to the act of which they complain and on which they found their prayer for an adjudication.'

Likewise the rule is clearly stated by the Court in Robinson v. Hanway, Fed. Cas. No. 11,953, as follows:

> 'But we are of the opinion that the original creditors' petition is void for want of proper petitioners, and did not give the Court jurisdiction of the case, and that the intervening petitions are also void for want of an original petition to give them force. It is not a case of amendment of a defective petition of which the Court has jurisdiction, and when the interveners perfect the petition by additional numbers and amounts. But it is an attempt to give life to a dead petition, to engraft branches upon a lifeless stock, and infuse vitality into it. The interveners must draw their support, if at all, from the original petition; but in this case the original petition is dead, and neither supports the interveners nor itself.''

In the case of Trammell v. Yarborough, 254 Fed. 685, the Court, in harmony with the other cases referred, said:

In this case an answer was filed by the alleged bankrupt, putting in issue the averments of insolvency and acts of bankruptcy, and averred a state of facts relied on as estopping the petitioners to maintain a proceeding. Subsequently other alleged creditors of Trammell filed an intervening petition, which was not acted on by the Court, and it was not served on, or answered, or pleaded to by Trammell. Still later on, another alleged creditor filed an intervening petition which the alleged bankrupt demurred to and answered. The District Court then made an order to the effect that:

> 'The Intervention as filed by other creditors seeking adjudication, and the petitioning creditors and intervening creditors having failed to appear and prosecute their action, the case was heard upon the answer and demurrers of the alleged bankrupt, and it appearing that the petitioners and interveners have failed to prosecute their action and that the demurrers as filed by the alleged bankrupt are sufficient, it is therefore ordered that the above styled and numbered cause be dismissed at the cost of petitioning creditors and interveners, reserving, however, to any other creditors of the alleged bankrupt the right to intervene and have the matter reopened within thirty days, and in the event no other creditor of said alleged bankrupt so intervenes for said purpose, then this order for dismissal shall be final. It is further ordered that a copy of this order be published three consecutive days in a leading Dallas newspaper.'

"Within the thirty days' time one Jack Yarborough and others filed a petition setting up the above-stated prior occurrences in the bankruptcy proceeding, and that petitioners were creditors in amounts stated, adopted the allegations of the

original previously filed intervening petitions in regard to the acts of bankruptcy and the insolvency of Trammell, and prayed that the above mentioned order dismissing the proceeding be set aside, and that the proceeding be reopened and the petitioners be permitted to intervene and that a hearing be had on the original and intervening petitions. To this latter petition Trammell demurred, and answered the petition, and prayed that the same be referred to a jury. The Court reopened the bankruptcy proceeding and permitted the petitioners in the last filed petition to intervene and join in the original petition, but referred the cause to a special Master in Chancery for a hearing upon issues of fact therein. This resulted in an adjudication of bankruptcy being made on the Master's report, and from that Trammell appealed.

The Court held:

"A revival of the proceeding at the instance of other creditors was not a joinder by them with those who previously had prosecuted the proceeding, because the latter had ceased to be actors in it. So far as they were concerned, the proceeding was not revived. They remained out of it. A reopening of the proceeding let to other creditors to carry it on after the elimination from it of all who previously had been actors, was in necessary effect the institution of a new proceeding."

The Court further held in that case that the language in paragraph 59f, Bankruptcy Act of July 1, 1898, presupposes the continued presence in the proceeding of petitioners with whom other creditors may join. It does not contemplate a revival of the proceeding after its life has been ended by the elimination of all who were actors in it; and the Court cites in Re Bolognesi, 223 Fed.

771, Circuit Court of Appeals, Second Circuit, in support of the doctrine that intervening creditors may join in a live petition where the joinder is with all or a part of the original creditors.

The opinion of the Court in that case continues in part as follows:

> "While Bankruptcy Act, § 59f (Comp. St. § 9643), provides that creditors other than the original petitioner may at any time enter their appearance and join in the petition, yet, where a petition in involuntary bankruptcy is entirely dismissed, it is improper for the Court to reserve to other creditors the right to intervene and have the matter reopened, and where creditors attempted to intervene pursuant to such leave, such proceeding can not be deemed a continuation of the original one."

In all of the foregoing cases the construction of Section 59f of the Bankrupt Act is in harmony with the opinion of the District and Circuit Court in the instant case, while the opinion in the case of Despres v. Galbraith is in harmony with Judge Hough's opinion in the case at bar upon the particular point of law involved, but in the Despres case the three original petitioners were parties to a general assignment made by the alleged bankrupt prior to the filing of the involuntary petition. The same three creditors having induced the alleged bankrupt to make the assignment and in consideration thereof having expressly released him from their debts, afterwards filed the involuntary petition against him. The Court held as a matter of fact that no one of the three were valid petitioners, or had any claim at all against the alleged bankrupt, therefore the proceeding itself from the be-

ginning had no validity; but at the same time while determining this fact decided the point of law involved in this case as it has been decided by the Circuit Court of Appeals, Second Circuit, in the case at bar.

A careful examination of the cases where this section of the Bankrupt Act has been construed indicates entire uniformity in expression, and opinion, upon this point of law. Counsel for respondents have made a careful examination of the decisions of both the District and Circuit Courts, and have found nowhere any opinion which conflicts with those quoted. We feel justified in saying that Section 59f, according to the strictest canon of construction, can have no other meaning except that creditors other than the petitioning creditors having valid claims against an alleged bankrupt, may at any time intervene and join in the original petition in any proper case. And this theory of the law is not only supported by the decisions of the courts, but as well by the text writers; and it seems likewise to be the almost universal opinion of the legal profession.

The National Bankrupt Act being remedial, its provisions are liberally construed with a view to carrying into effect its obvious purposes and intent, to the end that a debtor who has been unfortunate and become unable to pay his debts may be released therefrom and commence his business life anew, and his property applied equitably and ratably to the payment of his debts. Moreover, it has been the settled practice of the courts to construe the act in the most liberal manner compatible with principles of law and equity, to the end that its purpose may be fulfilled in a prompt and efficient administration of the estates

which come within the jurisdiction of the bankruptcy courts, by pleadings regularly filed, and where other provisions of the act are complied with.

The judgment of the court below should be affirmed.

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